

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED

NOV 15 1963

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 490.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,
Appellant,

vs.

ELI LILLY AND COMPANY,
Appellee.

REPLY TO MOTION TO DISMISS.

MYRON N. KRÖTINGER,
MORTON L. STONE,
300 Chester-Twelfth Building,
Cleveland 14, Ohio,
Attorneys for Appellant.

TABLE OF CONTENTS.

Reply to Motion to Dismiss -----	1
I. The Case Before This Court Involves an Actual Controversy Under the Supremacy Clause, Not a Hypothetical Question: Lilly Is Attempting by Notice to Bind Appellant to a Contract Which Is Unlawful Under Section 5(a)(5) of the McGuire Act -----	2
II. The Provisions of Paragraph Six of the Lilly Retail Fair Trade Contracts Are Integral to its Methods of Price Setting -----	6
III. It Is Immaterial That Lilly Does Not Compete With Wholesalers -----	6
IV. The Interpretation of the Ohio Fair Trade Act by the Supreme Court of Ohio Squarely Raises the Validity of the Statute Under the "Contract or Agreement" Provisions of the McGuire Act -----	7
V. The "Proprietary Interest" Concept of the New Ohio Fair Trade Act Has Been Utilized by Lilly Not Only to Set Resale Prices, But Also as a Means of Encumbering the Business Practices of the Retailers -----	9
Conclusion -----	10

TABLE OF AUTHORITIES.

Cases.

<i>International Business Machines v. United States</i> , 298 U. S. 131 (1936)	6
<i>International Salt Co. v. United States</i> , 332 U. S. 392 (1947)	6
<i>Old Dearborn Distributing Company v. Seagram Distillers Corp.</i> , 299 U. S. 183 (1936)	9
<i>United States v. Parke, Davis and Company</i> , 362 U. S. 29 (1960)	4

Statutes.

<i>McGuire Act</i> , Sec. 5(a) (5)	1, 2, 5, 6, 7, 8
<i>Ohio Revised Code:</i>	
Sec. 1333.28(E)	4
Sec. 1333.28(I)	2, 8
Sec. 1333.29(A)	2
Sec. 1333.29(B)	3, 7, 9
Sec. 1333.29(C)	4, 7
Sec. 1333.30	2
Sec. 1333.31	9
Sec. 1333.34	7
<i>Sherman Act</i> , Sec. 1	1

In the Supreme Court of the United States

No. 490.

OCTOBER TERM, 1963.

HUDSON DISTRIBUTORS, INC.,

Appellant,

vs.

ELI LILLY AND COMPANY,

Appellee.

REPLY TO MOTION TO DISMISS.

This reply is addressed to the Motion to Dismiss filed by Eli Lilly & Company. ("Lilly.") By this motion and the specious argument that only hypothetical questions are involved, Lilly offers the Court a placebo with the apparent hope that the real issues will pass unnoticed.

The judgment of the Court of Appeals of Cuyahoga County (Jurisdictional Statement, 71, 72) holds that the provisions of the Ohio Fair Trade Act "are neither in violation of the Constitution of the State of Ohio nor in violation of the Constitution of the United States." The judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio. (*Ibid.*, 86.)

Lilly passes off Appellant's argument addressed to Section 5(a) (5) of the McGuire Act and Section 1 of the Sherman Act by contending that its dealings in Ohio are limited to transactions with wholesalers. Lilly then argues that "there is nothing in the record below to indicate that Appellee's wholesalers have entered into horizontal price maintenance agreements."

These arguments do little justice to the record. *Lilly* omits all reference to its fair trade contracts with retailers entered into pursuant to the Ohio Fair Trade law.

I. THE CASE BEFORE THIS COURT INVOLVES AN ACTUAL CONTROVERSY UNDER THE SUPREMACY CLAUSE, NOT A HYPOTHETICAL QUESTION. LILLY IS ATTEMPTING BY NOTICE TO BIND APPELLANT TO A CONTRACT WHICH IS UNLAWFUL UNDER SECTION 5(a)(5) OF THE McGUIRE ACT.

The record in this case establishes that:

1. Lilly in this case is attempting to establish minimum resale prices for its products, by contracts with over 1,400 retailers in the State of Ohio. (Motion to Dismiss, at 4.)

2. Notice of these written contracts is given to retailers. (Warning Letter from Appellee to Appellant dated December 10, 1959, Exhibit C to Answer and Cross-Petition, Lilly Supplemental Record in the Supreme Court of Ohio, at 2 and 3.) Notice of such contracts or of resale prices is required to bind nonsigners to the terms thereof. (Ohio Fair Trade Act, Section 1333.28(I), Section 1333.29(A), Section 1333.30, Jurisdictional Statement, 89, 90, 91.)

3. The establishment by written contract of retail resale prices and the giving notice thereof is the fair trade method Lilly has adopted. (Motion to Dismiss at 4.)

4. Lilly has demanded that Appellant conduct its future operations "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act * * *." (Second Warning Letter from Appellee to Appellant dated January 26, 1960, Exhibit D to Answer and Cross-Petition, Supplemental Record before the Supreme Court of Ohio, at 4-5.)

By this second warning letter Lilly recalled to Appellant that it had enclosed duplicate copies of the Manufacturer-Retailer Fair Trade Contract; that "under the provisions of the Ohio Fair Trade Act you are obligated to uphold our minimum retail resale prices whether you have signed one of our contracts or not." (*Ibid.*, at 4.)

5. The contract of which notice is given by Lilly to the terms of which Lilly demands adherence by Appellant contains provisions authorized by the Ohio Fair Trade law. The contract states in part:

"6. Retailer agrees not to knowingly sell any of Manufacturer's 'Identified Commodities' to any dealer who fails to observe the minimum retail resale prices established under Paragraph 3 hereof." (Lilly Record before the Supreme Court of Ohio at 14.)

This provision is embodied in the Lilly Fair Trade Contract pursuant to Sections 1333.29(B)(2) and (B)(3) of the Ohio Revised Code which specifically provide:

"(B) Any such contract or notice may contain the following provisions:

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resell to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor

resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell." (Jurisdictional Statement 90-91.)

A "distributor" is defined by Section 1333.28(E) as "any person who acquires a commodity for the purpose of resale." (Jurisdictional Statement, at 88.) A retailer, as well as a wholesaler is thus encompassed by this definition.

6. The Lilly contract, with the restrictive selling provisions and the requirement that each retailer sell Lilly goods only to retailers who observe fair trade pricing, is entered into for the benefit of Lilly and every retailer in the State of Ohio who either contracts with Lilly or has notice of the fair trade contract. Section 1333.29(C) provides:

"(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice." (Jurisdictional Statement, 91.)

7. Each and every retailer to whom notice of the Lilly contract is given, whether or not a signer, is bound by and is in turn the beneficiary of every other such contract or notice. Consequently, every retailer with notice is bound to refuse to deal with any other retailer who, in the language of Paragraph 6 "fails to observe the minimum retail resale prices established under Paragraph 3 hereof."

8. The requirements for an unlawful combination have been amply satisfied. As this Court held in *United States v. Parke, Davis and Company*, 362 U. S. 29 (1960) at 46-47:

"But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. *The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.*"

9. When Lilly gave notice of its fair trade contracts to Appellant and demanded that Appellant's future operations be "in accordance with the obligations under the contracts and under the Ohio Fair Trade Act * * *," it was giving notice of, and attempting to bind Appellant to, a contract rendered unlawful and unenforceable by Section 5(a)(5) of the McGuire Act.

10. These infirmities were consistently raised and argued in the state courts.

11. Consequently, there is nothing hypothetical about the questions in this case concerning the validity under Section 5(a)(5) of the McGuire Act, of those portions of the Ohio Fair Trade Act authorizing horizontal price fixing. An actual controversy exists between the parties—namely, whether or not Lilly is entitled to enforce fair trade prices established by an unlawful contract which is authorized by a state statute which specifically sanctions violations of Section 5(a)(5) of the McGuire Act. This contract, which is part of the record in this case, is the very contract upon which the rulings were predicated in the courts below.

II. THE PROVISIONS OF PARAGRAPH SIX OF THE LILLY RETAIL FAIR TRADE CONTRACTS ARE INTEGRAL TO ITS METHODS OF PRICE SETTING.

Lilly cannot escape the patent invalidity of Paragraph six of its resale price maintenance contract by arguing that this paragraph may somehow be "disregarded." The fact remains that the paragraph is there and purports to be binding.

Comparable argument have uniformly been attempted before this Court and have uniformly failed. In *International Salt Co. v. United States*, 332 U. S. 392 (1947) this Court affirmed the granting of summary judgment upon agreements by which salt was "tied" to leases of patented salt dispensing machines.* In opposition to the summary judgment, the International Salt Company argued that the tying clause was neither insisted upon in all leases, nor was it always enforced. This Court held that "these facts do not justify the general use of the restriction which has been admitted here." 332 U. S. at 398.

The inclusion of the horizontal price fixing and boycotting provisions of Paragraph 6 of the Lilly contract confirm that these provisions are essential to Lilly's establishment of fair trade prices. Cf. *International Business Machines v. United States*, 298 U. S. 131 (1936), at 137.

III. IT IS IMMATERIAL THAT LILLY DOES NOT COMPETE WITH WHOLESALERS.

Lilly has attempted to sidestep the illegality of the fair trade contract of which it gave notice to Appellant. Lilly argues that it does not sell to retailers and is not in competition with wholesalers. (Motion to Dismiss at 3.)

Lilly's contention is wholly irrelevant to the illegality of its fair trade program under the Ohio statute by reason of Section 5(a) (5) of the McGuire Act which declares that

contracts or agreements "between retailers" and "between persons, firms or corporations in competition with each other" are unlawful. Surely, Lilly is not suggesting either (a) that some or all of its 1,400 Ohio retailers, who have agreed to boycott, and have combined to refuse sales to any price cutter whether in or out of Ohio are not "in competition with each other," or (b) that the 1,400 agreements to boycott discounters are not "between retailers."

Lilly contends, however, that the Ohio Fair Trade law by its terms relates only to vertical agreements "that is, agreements between a manufacturer and wholesaler, or between a manufacturer and retailer * * *." Lilly has significantly failed to cite to this Court the statutory exception in the Ohio Fair Trade Act which violates the horizontal price fixing ban of Section 5(a)(5) of the McGuire Act. The key phraseology in Section 1333.34 which the Lilly Brief has ignored provides, "except as specifically otherwise provided in Section 1333.29 of the Revised Code * * *." Section 1333.29(B) and Section 1333.29(C), as above indicated, contain the unlawful horizontal price fixing and boycotting provisions now incorporated in the Lilly contract.

IV. THE INTERPRETATION OF THE OHIO FAIR TRADE ACT BY THE SUPREME COURT OF OHIO SQUARELY RAISES THE VALIDITY OF THE STATUTE UNDER THE "CONTRACT OR AGREEMENT" PROVISIONS OF THE MCGUIRE ACT.

Lilly attempts to avoid joining issue upon the validity of the Ohio Fair Trade Act under the Supremacy Clause by failing to read the statute as interpreted by the Supreme Court of Ohio. Lilly insists that it has not merely given a "notice," but rather that it has given notice of an express contract.

The Supreme Court of Ohio has interpreted Section 1333.28(I) which defines "contract" as meaning "any agreement written or oral, or arising from the acts of the parties."

The Supreme Court of Ohio has held:

"This provision is the core of the act. When read in conjunction with the rest of the act, it provides in essence that, when a retailer with notice that an item has been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price." (Jurisdictional Statement at 77.)

The statute of a State means what the Supreme Court of that State has said it means. It does not mean what a litigant would prefer it to mean. When the essence of the Ohio Fair Trade Act, its "core," is stated by the Supreme Court of Ohio to be the doctrine of implied contract, the issues raised by Appellant under Sections 5(a), (2), (3), (4) and (5) are squarely before this Court. The Ohio Fair Trade law is based upon something other than the "contract or agreement" envisaged by the McGuire Act. There is, therefore, no substance to Lilly's attempted avoidance of a joinder upon the basic issues of this case by pleas that its prices are set by an express contract of which it merely gives notice. (Motion to Dismiss 4, 8.)

V. THE "PROPRIETARY INTEREST" CONCEPT OF THE NEW OHIO FAIR TRADE ACT HAS BEEN UTILIZED BY LILLY NOT ONLY TO SET RESALE PRICES, BUT ALSO AS A MEANS OF ENCUMBERING THE BUSINESS PRACTICES OF THE RETAILERS.

The Supreme Court of Ohio has referred to the conception of "proprietary interest" as "the first of the new concepts" embodied in the Fair Trade Law. Revised Code, Section 1333.31 indefeasibly vests the "proprietor" ("shall retain") with a "proprietary interest" in commodities sold by him to distributors. This "proprietary interest" is then made the vehicle for regulating the business practices of "distributors" in the daily conduct of their businesses.

Nothing like this provision has ever been before this Court. As noted, Lilly in Paragraph 6 of its Fair Trade Contract has expressly imposed such restrictions. In *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U. S. 183 (1936) the statute before this Court permitted only resale price maintenance.

The Ohio statute goes much further. It provides that a notice served upon a remote vendee without his consent may nevertheless contain requirements that the vendee, upon resale of the trade-marked goods, must affirmatively exact promises from his customers that such customers will also adhere to the stipulated minimum prices for their level of distribution. Revised Code, Section 1333.29(B)-(2).

Failing to abide by such regulation, he faces the possibility of litigation from every beneficiary of the notice, including (a) the proprietor of the trade mark, and (b) every other person who has either signed a fair trade contract, or (c) who has been served with a notice which also includes a business restriction. Revised Code, Section 1333.29(B) (3).

The Lilly fair trade contract is carefully framed to impose these burdens. Noting in either federal trademark legislation or the common law permits such restrictions on business freedom under the guise of the protection of trademarks.

CONCLUSION.

The Ohio Fair Trade Act as utilized by Appellee in implementing its fair trade program in Ohio has become a forceful and effective tool for the systematic curtailment of Appellant's property rights. Inherent in the program is a rejection of every safeguard against abuse of the anti-trust laws written into the McGuire Act. For Lilly to suggest that Appellant's challenge to the constitutionality of the Act in this case is hypothetical, is to deny that which is real and is expressly written into Lilly's Fair Trade program.

The constitutional questions are genuine and substantial. Appellee's motion to dismiss the appeal should be overruled.

Respectfully submitted,

MYRON N. KROTINGER,
MORRIS L. STONE,

300 Chester-Twelfth Building,
Cleveland 14, Ohio,

Attorneys for Appellant.